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No. 08-479

IN THE
Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1, ET AL.,
Petitioners,

v.

APRIL REDDING,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND ITS ARIZONA CHAPTER, THE NATIONAL EDUCATION ASSOCIATION, THE NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF RESPONDENT APRIL REDDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii
INTEREST OF *AMICI CURIAE*.....1
SUMMARY OF ARGUMENT.....2
ARGUMENT 5
I. A Strip Search Of A 13-Year-Old Student By School Authorities Is An Extraordinarily Intrusive Search.....5
A. Social Science Research Warns That Strip Searches Can Cause Severe Emotional And Psychological Harm To Children. 6
B. States, School Boards, And Courts Have Agreed With Social Science Researchers That School Strip Searches Are Excessively Intrusive And Traumatic. 14
II. An Excessively Intrusive Search, Such As A Strip Search, Could Only Be Justified By A Heightened Quantum Of Suspicion. 18
A. The Reasonable Suspicion Determination Must Balance Risk To Health/Safety, Locational Specificity, Weight Of Available Evidence, And Possible Alternatives To The Search. 18
B. The Decision To Strip Search Savana Was Wholly Unjustified Under *T.L.O.*.....26
CONCLUSION 33

TABLE OF AUTHORITIES

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Bravo ex rel. Ramirez v. Hsu, 404 F. Supp. 2d 1195 (C.D. Cal. 2005) 31

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993) 16

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Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993) 7

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982) 16

In re K.C.B., 141 S.W.3d 303 (Tex. Ct. App. 2004) 21, 24

Jenkins by Hall v. Talladega City Board of Education, 115 F.3d 821 (11th Cir. 1997) .. 20, 23

Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992) 16

Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618 (2007) 32

New Jersey v. T.L.O., 469 U.S. 325 (1985) .. *passim*

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Cal. Educ. Code § 49050 15

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INTEREST OF *AMICI CURIAE*

With 145,000 members, the National Association of Social Workers ("NASW") is the largest organization of professional social workers in the world, with fifty-six chapters in the United States and internationally.[1] The Arizona Chapter of NASW represents 1,936 members. NASW's members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, making them directly interested as providers of mental health services to schoolchildren who experience trauma.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA has long supported the constitutional rights of students, filing amicus briefs with this Court in *Goss v. Lopez* (due process), *Ingraham v. Wright* (corporal punishment), *Bethel School District v. Fraser* (free speech), and *New Jersey v. T.L.O.* (warrantless searches). NEA has, in addition, adopted various resolutions opposing unreasonable searches of students by school officials.

The National Association of School Psychologists ("NASP") represents over 25,000 school psychologists and related professionals throughout the United

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part. The DKT Liberty Project contributed money to support the preparation and submission of this brief although the *amici* were not compensated in any way.

States and 25 foreign countries. Founded in 1969, it is the world's largest organization of school psychologists. NASP members work in educational settings from preschool through the university level.

The American Society for Adolescent Psychiatry ("ASAP") is the only organization specializing in adolescents and their families in the area of mental health issues. ASAP represents the needs of adolescents and of adolescent psychiatrists both within psychiatry and in the larger community.

The American Professional Society on the Abuse of Children ("APSAC") is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy. Founded in 1987, APSAC has more than 2,500 members, including professionals from all fifty states. APSAC seeks to increase knowledge about abuse and to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals.

Amici submit this brief to explain and document the intrusive nature and traumatic effects of school strip searches on adolescents and school communities.

SUMMARY OF ARGUMENT

In *New Jersey v. T.L.O.*, this Court mandated that schoolhouse searches be "reasonably related to the objectives of the search and not excessively intrusive." 469 U.S. 325, 342 (1985). And Justice Stevens gave heft to what "excessively intrusive" meant when he observed, "One thing is clear under any standard—the shocking strip searches that are

described in some cases have no place in the schoolhouse." *Id.* at 382 n.25 (Stevens, J., concurring in part & dissenting in part). Yet, some school officials have used the extraordinarily intrusive technique of strip searches on children and adolescents. *Amici* represent groups who work daily on behalf of children and are uniquely aware of the psychological and emotional harm to which children can be exposed. Social science research demonstrates that strip searches can traumatize children and adolescents and result in serious emotional damage. The effects, both acute and long-term, can be akin to those of psychological maltreatment. Likewise, states, school boards, and courts nationwide have recognized that strip-searching children is severely intrusive.

Because they are excessively intrusive, schoolhouse strip searches are only permissible, if ever, in a very narrow range of cases. Pursuant to *T.L.O.*'s mandate, such searches require a heightened quantum of suspicion, which is informed by four factors. First, *T.L.O.*'s mandate to consider a search's intrusiveness in light of the "nature of the infraction" requires limiting strip searches to instances in which the item searched for poses an immediate and serious risk to health or safety. Second, such highly invasive searches must be justified by specific evidence indicating that the contraband will be detected by means of the contemplated search. Third, a heightened weight of evidence, considering both its nature and reliability, must support the first two factors. Fourth, an intrusive strip search is not justified where there are

alternatives that would neutralize the immediate danger.

Under this analysis, the strip search of Savana Redding was wholly lacking in the reasonable suspicion mandated by *T.L.O.* First, the potential possession of menstrual cramp medication posed no immediate threat to health or safety. Second, there was no evidence that pills were located on Savana in a place that necessitated a strip search. Third, considering the weight of evidence, the only source of information was an uncorroborated tip from another student already in trouble for possessing the same medication. Fourth, less intrusive alternatives, including questioning others, searching other locations, and calling Savana's parents before resorting to a strip search, were ignored.

What is clear is that a thirteen year-old honors student with no disciplinary problems was forced to undergo a strip search that left her exposed, subjecting her to immediate humiliation, embarrassment, and to potentially long-term emotional and social trauma, because of her alleged possession of Ibuprofen and based solely on the statement of another student. If the Constitution and this Court's decision in *T.L.O.* do not prevent such excessively intrusive searches, then America's schoolchildren have been effectively carved out from the constitutional protections they are told in class apply to all.

ARGUMENT

I. A Strip Search Of A 13-Year-Old Student By School Authorities Is An Extraordinarily Intrusive Search.

In *New Jersey v. T.L.O.*, this Court established the test for determining whether the search of a student violates the Fourth Amendment. 469 U.S. 325 (1985). "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42 (footnote omitted). Critically, the search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction*." *Id.* at 342 (emphasis added).

Underpinning this ruling is the fact that children are not just short adults. As NASW has stated, "NASW supports the fact that children and youth are developmentally different from adults and must be treated appropriately." *Social Work Speaks, National Association of Social Workers Policy Statements, 2009-2012* 210 (8th ed. 2009). Here, those developmental differences require not only a different framework to analyze the reasonableness of Fourth Amendment searches, but also a clear understanding of the effects of excessively intrusive

searches on children and youth. On that subject, *amici* can speak with some authority.

A. Social Science Research Warns That Strip Searches Can Cause Severe Emotional And Psychological Harm To Children.

Amici recognize the importance of treating children in ways that recognize their developmental differences, including in the disciplinary context. As NASW has noted, "It did not take long for early [juvenile justice] reformers to realize [that] it was neither humane nor effective to treat children and youths in the same manner as adults." *Social Work Speaks, supra*, at 208. Treating children the same as adult suspects and offenders, including using law enforcement techniques designed for adults, is neither useful as a practical matter nor acceptable as a constitutional matter.

Recognizing this reality, schools generally do not treat children as adults, but appreciate the developmental phases of youth and adolescence. So, it is a matter of concern that some schools have resorted to applying the most intrusive adult detection procedures, such as strip searches, to children. The failure to appreciate the emotional and psychological impact of these searches, both on the child and the peer group, has led some school officials to underestimate the immediate and long-term consequences of strip searches.

Even for adults, a strip search is a demeaning and distasteful procedure that requires a high level of justification. For children and adolescents, it is far more significant. "With the onset of puberty,

most young people begin to make a thorough assessment of themselves," including comparing their bodies. F. Philip Rice & Kim Gale Dolgin, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE at 168 (11th ed. 2005). "This critical self-appraisal is accompanied by self-conscious behavior that makes adolescents vulnerable to embarrassment." *Id.*

Therefore, for adolescent youth, "[c]linical evaluations of the [youth] victims of strip searches indicate that they can result in serious emotional damage, including the development of, or increase in, oppositional behavior." Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998). Indeed, students who have undergone strip searches "often cannot concentrate in school, and, in many cases, transfer or even drop out." Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 Critical Criminology 117, 126 (2006); s*ee also Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988) ("Children are especially susceptible to possible traumas from strip searches."), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993); Kristin D. Eisenbraun, *Violence in Schools: Prevalence, prediction, and prevention*, 12 Aggression & Violent Behav. 459, 465 (2007) ("Strip searches have been shown to have a negative impact on student self-esteem."). And "[p]sychological experts have also testified that victims often suffered post-search symptoms including 'sleep disturbance, recurrent

and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions,' and that some victims have been moved to attempt suicide." Steven F. Shatz *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991).

Strip searches, therefore, can have effects akin to those of psychological maltreatment. Psychological maltreatment produces both acute and long-term negative effects that may include "attachment disorders, limitations in cognitive ability and problem solving, poor academic achievement, poor peer relationships, behavior problems, anxiety disorders (especially PTSD), and anti-social behavior." *Am. Prof. Soc. on the Abuse of Child.*, *Practice Guidelines: Psychosocial Evaluation of Suspected Psychological Maltreatment in Children and Adolescents*, at 3 (1995).

Indeed it is worth noting that the trauma of a strip search actually could *encourage* some of the precise inappropriate behavior that strip searches are supposed to detect and prevent. *See National Child Traumatic Stress Network - Understanding Child Traumatic Stress*, http://www.nctsn.org/nccts/nav.do?pid=ctr_aud_prnt_under (last visited Mar. 30, 2009) ("Adolescents can try to get rid of post-trauma emotions and physical responses through the use of alcohol and drugs."). Trauma may also lead to feelings of revenge that "interfere with [students'] efforts to manage aggressive feelings in a more constructive, rule abiding way." *Id.* Given such potential effects, "The best approach is prevention of the trauma." Am. Acad. of Child &

Adolescent Psychiatry, *Facts for Families: Posttraumatic Stress Disorder (PTSD)*, No. 70, (updated Oct. 1999), http://www.aacap.org/cs/root/facts_for_families/posttraumatic_stress_disorder_ptsd (last visited Mar. 30, 2009).

Nor is this research just theoretical. In a well-known case in Pennsylvania, school officials conducted strip searches of seven adolescents based on a student tip that one of them was distributing marijuana. All seven were evaluated by a psychologist. All seven had developed some stress symptoms from the search, and two of the seven were diagnosed with full-blown Post Traumatic Stress Disorder. The author of the study summarized:

> The more severe stress responses included refusal to go back to school, ruminations about revenge, undesired thoughts about the incident, loss of faith in school staff whom they once trusted, increased tendency toward either avoidance and withdrawal or aggression and increased anger and defiance at home. These symptoms lasted long enough in the older students to result in attempts to withdraw from school and alleged delinquent behavior.

Hyman & Perone, *supra*, at 14.

These findings are reinforced by individual accounts of student victims of strip searches. For example, a 15-year-old girl with no disciplinary history was strip searched by New York school

officials for suspicion of possessing marijuana. A psychiatrist who treated the girl during fourteen visits following the strip search stated, "Quite consistently, she showed symptoms of intense anxiety, loss of concentration, loss of sleep. She gave up her plans to go to an out-of-town college and, in fact, had to repeat a semester in school." Dennis Hevesi, *Jury Awards $125,000 to Student Strip-Searched at a Bronx School*, N.Y. TIMES, Nov. 24, 1988, at B3; *see also* Verdict Summary, *McCloud v. Fortune*, 510 F. Supp. 2d 649 (N.D. Fla. 2007), 2006 WL 1195092 (psychologist for 15-year-old girl strip searched by police testified that girl "now has fear of all authority figures …. cloistered herself after the search and has stopped socializing with friends and family.").

Strip searching of adolescents also implicates "some very specific gendered problems." *Finley*, *supra*, at 128. "Menstruating females, for instance, are likely to be even more self-conscious about their bodies." *Id.* Strip searching of females, and males as well, is also potentially worrisome because of the "similarities between strip searches by authority figures and prior incidents of sexual abuse." *Id.* The two factors that most highly correlate with trauma in sexual abuse cases are also present in child strip search cases: "the child's participation is usually coerced, and the searcher is invariably an adult." Jesse Ann White, *A Study of Strip Searching in Pennsylvania Public Schools and an Analysis of the Knowledge, Attitudes, and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching* 37 (Aug. 2000) (unpublished Ph.D.

dissertation, Temple University) (on file with the Temple University Graduate Board) (quotation marks omitted). The fact that a strip search is a one-time occurrence and that the child's body is "viewed rather than touched, do[es] not diminish the trauma experienced by the child." *Id.*

Beyond the immediate emotional impact of coercion, humiliation, and embarrassment, strip searches "label" students and "create stigmas that can be long-lasting," affecting the victims' relationship with their peers and school officials. *Finley, supra*, at 121. Most children and youth who have been strip searched at school experience "difficulties with relationships, including those with peers, educators, and family." *Id.* at 126. Clinical data also indicates that strip searches in which students are required to remove all or most of their clothes "are generally not very successful and tend to cause the greatest emotional turmoil." *Hyman & Perone*, *supra*, at 15. In short, strip searches are very likely to damage students emotionally and to undermine individual student morale.

The use of strip searches also can adversely affect the school environment, increasing student mistrust and alienation. *Hyman & Perone*, *supra*, at 15. Researchers have found that an "unwelcoming and highly inspected school environment," such as a school environment in which strip searches occur, "leads to more school misconduct as opposed to reducing it." Eisenbraun, *supra*, at 465.

Not surprisingly, strip searches also can potentially change "students' perceptions of school

staff from caregivers/educators to policemen/enforcers." *Hyman & Perone*, *supra*, at 15. In this case, the use of the school nurse to facilitate the strip search supports this "policemen/enforcer" perception in an especially detrimental manner, sowing mistrust and diminishing the likelihood that students will rely upon the school nurse and school officials in confidence. *Cf.* Helen Freake *et al.*, *Adolescents' views of helping professionals: A review of the literature*, 30 J. ADOLESCENCE 639, 646 (2007) (having medical and mental health professionals protect confidentiality and be kind, caring, and trustworthy are among the top five most important factors to adolescents in dealing with these professionals).

Moreover, it is clear that in this case, as in the cases described in the research, the strip search created significant emotional stress. As Savana Redding herself described, the strip search was both extremely intrusive and humiliating:

> I took off my clothes while they both watched. Mrs. Romero searched the pants and shirt and found nothing.
>
> Then they asked me to pull my bra out and to the side and shake it, exposing my breasts. Then they asked me to pull out my underwear and shake it. They also told me to pull the underwear out at the crotch and shake it, exposing my pelvic area.

J.A. 23a-24a, ¶¶ 19-20. Short of a body cavity search, forcing a thirteen-year-old girl to remove all of her clothes was the most intrusive search possible. And, consistent with the social science research in similar circumstances, the devastating emotional effect on Savana, and her resulting mistrust in school officials, is undeniable. As Savana stated:

> I was embarrassed and scared, but felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry.
>
> …
>
> The strip search was the most humiliating experience I have ever had. Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes. They did nothing to respect my privacy.
>
> …
>
> I felt offended by the accusations made against me and violated by the strip search.

J.A. 24a-25a, ¶¶ 21, 28, 30.

Because strip searching children at school clearly does inflict damage, and in keeping with the basic tenet that children must be differentiated from adults, NASW urges that disciplinary practices in schools "must reflect the desire to shape students'

behavior toward productive participation in schools and society," and utilize a problem-solving process with parents and guardians. *Social Work Speaks, supra*, at 102. NASW also has found that an important positive health factor for adolescents is a school where staff members "create empathetic relationships with students and provide opportunities for youth to feel competent, valued, and respected." *Id.* at 4. Such school environments "enable youths to resist and overcome negative influences in their lives more effectively." *Id.* By contrast, as NASP has stated, "zero tolerance policies ha[ve] resulted in a range of negative outcomes with few if any benefits to students or the school community." Nat'l Ass'n of Sch. Psychol., *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, at 3 (2008), at http://www.nasponline.org/educators/zero_alternative.pdf. The studies and analysis demonstrate that strip searches undermine students' productive participation in school, produce significant emotional harm, and damage relationships with peers and school officials.

B. States, School Boards, And Courts Have Agreed With Social Science Researchers That School Strip Searches Are Excessively Intrusive And Traumatic.

States and school boards have recognized the traumatic effects of schoolhouse strip searches and prohibited or severely restricted their use. At least seven states have prohibited such strip searches, including Wisconsin, which has criminalized their use by school officials. *See* Wis. Stat. § 948.50(3); *see*

also Cal. Educ. Code § 49050 (no body cavity search or inspection of "underclothing, breast, buttocks, or genitalia"); Iowa Code § 808A.2(4)(a) & (b) (no body cavity or strip search); Okla. Stat. tit. 70, § 24-102 (no strip search); N.J. Stat. Ann. § 18A:37-6.1 (no body cavity or strip search); S.C. Code Ann. § 59-63-1140 (no strip search); Wash. Rev. Code § 28A.600.230(3) (no body cavity or strip search). Likewise, individual school boards, including some in Arizona, have prohibited strip searches. *See, e.g.*, Mesa Unified School Dist. Governing Bd. Policy and Admin. Regs., Code JFG at 800 (rev. 1999), at http://www.mpsaz.org/policies/MPSpolicy.pdf (last visited Mar. 30, 2009); Scottsdale Unified School Dist. No. 48 Policy Manual, J-3400 JIH (2003), at http://lp.ctspublish.com/asba/public/lpext.dll/Scottsdl/1890/1cd1?fn=document-frame.htm&f=templates&2.0 (last visited Mar. 30, 2009). Indeed, New York, a city well aware of safety and security risks, is among those districts banning strip searches of students. New York City Dep't of Education, Regulation A-432 (2005), at http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A-432.pdf (last visited Mar. 30, 2009). Where they have not banned such searches altogether, some school districts have placed stringent limitations on their use. *See, e.g.*, Pitt County Board of Education, Policy 10.201 (2008), at http://www.pitt.k12.nc.us/boe/files/10/10.201-P_Search_and_Seizure_Procedures.doc (last visited Mar. 30, 2009) (permitting strip searches only where probable cause and when conducted by law enforcement outside presence of school officials); School Board of the City of Virginia Beach Regulation 5-65.1 (2001), at http://www.vbschools.

com/policies/5-65_1r.asp (prohibiting strip searches, but providing exception where student poses immediate danger by possessing item).

Courts nationwide and beyond also have recognized the severely intrusive and traumatic nature of strip searches. *See Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993) (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.") (quotation marks omitted); *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) (same); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience."); *R. v. Golden*, [2001] 3 S.C.R. 679 (Can.) ("strip searches … are often a humiliating, degrading and traumatic experience").[2]

The potential trauma is of particular concern when children and adolescents are at issue. The common sense conclusion that a strip search of a young teenager at school is a uniquely invasive act was eloquently stated by the Seventh Circuit:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an

[2] More generally, clothing and lack thereof is of such psychological significance that it has been used affirmatively as an interrogation tool. *See* Central Intelligence Agency, *Kubark Counterintelligence Interrogation*, 86 (1963), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark (clothing of detainees taken because their clothing "reinforces identity and thus the capacity for resistance.").

> invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency.
>
> …
>
> We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles. It is not enough for us to declare that the little girl involved was indeed deprived of her constitutional and basic human rights. We must also permit her to seek damages from those who caused this humiliation and did indeed act as though students "shed at the schoolhouse door rights guaranteed by * * *any * * *constitutional provision."

Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980) (citation omitted); *see also Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("no one would seriously dispute that a nude search of a child is traumatic"); *People v. D*, 315 N.E.2d 466, 471 (N.Y. 1974) ("psychological damage that would be risked on sensitive children by random [strip] search insufficiently justified by the necessities is not tolerable."). Courts have also recognized that adolescents are likely to suffer greater trauma from a strip search because, as they "go through puberty, they become more conscious of their bodies and self-conscious about them."

Cornfield, 991 F.2d at 1321 n.1. As this Court has stated, "[Y]outh .... is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

Thus, social science, state statutes, school regulations, and precedent all establish that a strip search of a child by school officials is excessively intrusive. And it has consequences that must be taken into account. Moreover, Petitioners and the United States agree. *See* Pet'r Br. at 34 ("Petitioners do not deny the emotional effect of the search conducted in this case."); U.S. Br. at 15 (strip search "creates a potential for trauma"). *Amici*, representing over 3.3 million professionals with an interest in child welfare and education, concur. Accordingly—as many states and school districts have concluded independently—under *T.L.O.*, such a schoolhouse search is only warranted, if ever, in a very narrow range of cases.

II. An Excessively Intrusive Search, Such As A Strip Search, Could Only Be Justified By A Heightened Quantum Of Suspicion.

A. The Reasonable Suspicion Determination Must Balance Immediate Risk To Health/Safety, Locational Specificity, Weight Of Available Evidence, And Possible Alternatives To The Search.

As this Court has long recognized, any search of a person is a "substantial invasion of privacy" that is unconstitutional unless conducted pursuant to the strictures of the Fourth Amendment. *T.L.O.*, 469

U.S. at 337. A search of a student's body or possessions "no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38. Still, the Court also has recognized the challenges faced by school officials in "maintain[ing] an environment in which learning can take place." *Id.* at 340. By making two limited exceptions—namely, excusing both the warrant requirement and "*strict* adherence to the … probable cause" requirement—to Fourth Amendment procedures for school searches, *T.L.O.* articulated a standard that considered the needs of school officials while "ensur[ing] that the interests of students will be invaded no more than is necessary." *Id.* at 340-43 (emphasis added). Ensuring that a student's interests are invaded "no more than is necessary" requires that the quantum of school officials' suspicion increase as the level of intrusiveness of the search increases.

Therefore, whether any schoolhouse search is reasonable under the Fourth Amendment "will vary according to the context of the search." *Cornfield*, 991 F.2d at 1320. Schoolhouse searches must be "reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction*." *T.L.O.*, 469 U.S. at 342 (emphasis added). Given their extremely intrusive nature, strip searches could only be authorized where a heightened quantum of suspicion is present. *See* Pet. App. 18a-19a; *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006) ("[T]he reasonableness of the suspicion [under *T.L.O.*] is informed by the very intrusive nature of a

strip search, requiring for its justification a high level of suspicion.") (internal citation omitted); *Cornfield*, 991 F.2d at 1321 ("[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."). Therefore, what may constitute reasonable suspicion for a pocket or locker search "may fall well short of reasonableness for a nude search." *Cornfield*, 991 F.2d at 1321. Four factors inform the heightened quantum of suspicion that is required as the intrusiveness of a school search increases.

First, as the United States agrees in its amicus brief, *T.L.O.*'s mandate to consider the intrusiveness in light of the "nature of the infraction" indicates that a highly intrusive search, such as a strip search, could be used only, if at all, to locate items that pose an immediate and serious risk to health or safety. *See* Brief of United States at 18; *see also Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1168-69 (11th Cir. 2001) (concluding that given "the important privacy interests at stake and the intrusive nature of the searches, school officials must have possessed a truly important interest that would have otherwise been endangered in order to justify" a strip search), *vacated for reconsideration*, 536 U.S. 953 (2002), *reinstated* 323 F.3d 950 (11th Cir. 2003); *Cornfield*, 991 F.2d at 1320 ("a highly intrusive search in response to a minor infraction" would violate *T.L.O.*); *Jenkins by Hall v. Talladega City Board of Education*, 115 F.3d 821, 834 (11th Cir. 1997) (Kravitch, J., dissenting) (citing *Justice*, 961 F.2d at 193) ("Strip searching a student is permissible only in extraordinary cases and only to prevent imminent

harm."). This must be a fact-based inquiry that focuses on actual and imminent danger, not whether a broad "category" of some potential danger is implicated. *See T.L.O.*, 469 U.S. at 341 (inquiry requires examination of "all the circumstances").

The mere suspected presence of some form of contraband does not qualify as an immediate danger to health or safety. For instance, "Immediacy of action [to discover marijuana] is not as necessary as could be found with a tip regarding a weapon." *In re K.C.B.*, 141 S.W.3d 303, 309 (Tex. Ct. App. 2004) (anonymous tip about marijuana did not warrant strip search of student). Here, the Ninth Circuit correctly considered the actual danger posed by the medication in question and found that it posed "an imminent danger to no one." Pet. App. 29a. Though this Court stated that judges "should, as a general matter, defer" to schools regarding rules that are "important to preservation of order," it has never suggested that a Fourth Amendment analysis should disregard the facts at hand to find an immediate danger where none exists. *T.L.O.*, 469 U.S. at 341-42 & n.9. Rather, *T.L.O.*'s mandate to examine all the circumstances requires a careful consideration of the actual facts indicating immediate danger, lest courts countenance the trauma and consequences of a strip search where no such danger exists.

Second, because *T.L.O.* prohibits "excessively intrusive" searches, a severely intrusive search must be justified by specific evidence indicating that the contraband will be detected by means of the contemplated search. As acknowledged by the United States, *T.L.O.* requires this locational

specificity in addition to immediate danger. *See* U.S. Br. at 15-17. The Ninth Circuit appropriately recognized the lack of such evidence here. Pet. App. 26a-27a (distinguishing *Cornfield* where "most importantly, the information provided a basis to believe that a strip search was necessary to reveal the contraband."); *Cf. Cornfield*, 991 F.2d at 1319 (school officials directly observed suspicious object in crotch area). Without specific evidence that a student is concealing contraband in a place where a strip search would be necessary to reveal it, such a search cannot be "reasonably related to the objectives of the search" consistent with the prohibition on being "excessively intrusive." *T.L.O.*, 469 U.S. at 342.

Third, to ensure that highly intrusive searches are not "excessively intrusive," *T.L.O.* requires that a heightened weight of evidence support the first two factors enumerated here. Thus, this third factor requires an examination of the nature and reliability of the evidence indicating the presence of dangerous contraband as well as the specific location of the contraband. The question is whether a heightened weight of evidence supports both an immediate threat to health or safety and the concealment of contraband in an area implicating the need for a strip search.

For instance, suspicion that largely relies on an uncorroborated student tip may fall short of the necessary proof. *See, e.g.*, *Phaneuf*, 448 F.3d at 598 ("[Principal's] acceptance of one student's accusatory statement to initiate a highly intrusive search of another student-with no meaningful inquiry or

corroboration-concerns us."); *Fewless ex rel. Fewless v. Bd. of Educ.*, 208 F. Supp. 2d 806, 818 (W.D. Mich. 2002) (constitutional school searches "include the presence of more evidence and evidence of greater reliability than the instant case."). This heightened weight of evidence is necessary before the Fourth Amendment will allow such bodily intrusion. *See Phaneuf*, 448 F.3d at 596; *Cornfield*, 991 F.2d at 1321-23; *see also T.L.O.*, 469 U.S. at 347 (suspicion was "substantial enough" to justify intrusive examination of letters where pipe, plastic bags, marijuana, substantial amount of money, and list of debtors were found in purse). As the Ninth Circuit held, this "heavy burden is necessary to justify a [strip] search accurately described … as 'de-meaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing.'" Pet. App. 23a (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)).

Finally, the fourth factor requires consideration of any alternatives that would neutralize the immediate risk to health and safety and avoid the potential trauma of an intrusive strip search. *See* Pet. App. 23a-24a, 32a (finding that school officials could have conducted additional investigation and sent Savana home to neutralize threat); *Jenkins by Hall*, 115 F.3d at 833 (Kravitch, J., dissenting) (strip search excessively intrusive where "other reasonable, minimally intrusive options were available."). *T.L.O.* requires that, when searching students, the "interests of students will be invaded no more than is necessary." *T.L.O.*, 469 U.S. at 343. This requirement demands that alternatives to a highly

intrusive search be considered, ensuring that such a search—where otherwise warranted—is a truly necessary invasion of students' interests. Therefore, given the highly intrusive nature of strip searches, they are "excessively intrusive" and unnecessarily invasive under *T.L.O.* where other alternatives to neutralize the threat are available.

Amici recognize that weapons could certainly pose an immediate threat to health or safety. Yet, even where weapons are suspected, a strip search would not be justified if the suspected weapon is not likely to be hidden in underwear, or if the clothes the student is wearing could not hide the weapon. Indeed, a (hand-held) metal detector should often be able to confirm whether a weapon is present. Likewise, if a weapon might be located in pockets, shoes or socks, a search of that limited scope should be conducted before considering a strip search.

And where the suspected contraband is dangerous drugs that pose an immediate threat to safety, that danger may often be neutralized by separating and supervising the student pending additional investigation. *See In re K.C.B.*, 141 S.W.3d at 309 (distinguishing drugs from threat of weapon). Less intrusive avenues for search, such as searching backpacks, lockers, and pockets, should be pursued first. *See Phaneuf*, 448 F.3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search."); *Fewless*, 208 F. Supp. 2d at 817 (school official did not speak with other students, teachers or Fewless's parents, nor did

he search Fewless's locker prior to ordering the strip search). Where suspicion remains, school officials generally can neutralize any danger posed by drugs by isolating the student, placing the student under supervision, and/or transferring the student to the custody of their parents. *See* Pet. App. 32a. Such measures can balance the interest in meeting the safety needs of the school without the significant trauma of a strip search. Indeed, they are required by the constitutional obligation to balance "the need to search against the invasion which the search entails." *T.L.O.*, 469 U.S. at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

These four factors must also be weighed in the context of the caregiver relationship of teachers and school administrators, who are entrusted to "do no harm." As this Court has often recognized, schools serve a "fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). "[P]ublic school officials … act in furtherance of publicly mandated educational and disciplinary policies" and are entrusted with the well-being of students. *T.L.O.*, 469 U.S. at 336. Given this critical role, it is self-apparent that school officials should not affirmatively cause harm. *See, e.g.*, Gary B. Melton & Janet Corson, *Psychological Maltreatment and the Schools: Problems of Law and Professional Responsibility*, 16 Sch. Psychol. Rev. 188, 192 (1987) ("[P]rotection from psychological harm is consistent with the state's interest in the healthy socialization of children"); Nat'l Ass'n of Sch. Psychol., *Position Statement: Children's Rights*, at 2 (2003), at http://www.nasponline.org/about_nasp/positionpaper

s/ChildrensRights.pdf ("School discipline [should be] administered in a manner consistent with a child's human dignity and basic rights.").

In sum, pursuant to *T.L.O.*, school strip searches are a severe invasion of the privacy of children that are rarely, if ever, justified. For "[a]lthough students may surrender some expectations of privacy when they enter the schoolhouse door, an expectation that they will be free from forced strip searches is not one of them." *Thomas*, 261 F.3d at 1168. As social science research, seven states, and courts have recognized, strip searches can inflict profound psychological and emotional damage on children. Thus, strip searches are not only a shocking affront to the privacy of children, but also an affront to their very well-being. Consistent with the thoughtful balancing of *T.L.O.* and the four factors articulated here, *amici* urge the Court to affirm that the Constitution will not easily, if ever, tolerate compelling our children to strip at school.

B. The Decision To Strip Search Savana Was Wholly Unjustified Under *T.L.O.*

Even if a school strip search of a 13-year-old girl might be justified in some extreme circumstances, it was certainly not justified here. To the contrary, the uncorroborated tip of a self-interested student—which did not even suggest that the medication might be hidden under Savana's clothes—was not close to adequate grounds to conduct the strip search. The fact that alternatives to strip searching were ignored only emphasizes the unquestionable Fourth Amendment violation here.

Considering the first factor, Savana posed no immediate threat to health or safety. While Ibuprofen (in either prescription strength or over-the-counter strength) may have been proscribed at school, it is nonetheless relevant to the reasonableness of the search that the "nature of the infraction" here involved the possible possession by a 13-year-old girl of a medication commonly used to relieve menstrual cramps.[3]

Considering the second factor, there is no evidence indicating the concealment of contraband in an area implicating the need for a strip search. Indisputably, there was no specific evidence whatsoever that Savana was concealing pills under her clothes. *See* Pet. App. 6a-9a; U.S. Br. at 20-22.

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[3] Unlike the "drug search" cases relied on by the Ninth Circuit panel decision, there was no suspicion that Savana was in possession of a dangerous, non-medicinal drug. *Cf. Cornfield*, 991 F.2d at 1322 (suspicion of "crotching drugs" like marijuana and cocaine); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 882 (6th Cir. 1991) (suspicion of white powder and a volatile substance called "rush"). Instead, the only two drugs ever referenced were Ibuprofen and Naprosyn. As Assistant Principal Wilson acknowledged, the blue Naprosyn tablet found is an over-the-counter medication. *See* J.A. 13a, ¶ 13. Notably, treatment of menstrual cramps is among Naprosyn's approved uses for adolescents. *See The Harriet Lane Handbook, A Manual for Pediatric House Officers* 892 (Jason Robertson & Nicole Shilkofski eds., The Johns Hopkins Hospital, 17th ed. 2005). Moreover, the dosage of the pill found on the other girl, 200 mg, is within the recommended dosage range for treatment of menstrual cramps. *See id.* (stating recommended dosage as 250 mg every 6-8 hours). Likewise, 400 mg of Ibuprofen is an approved dosage for the treatment of menstrual cramps. *See id.* at 840. It is also the equivalent of two standard over-the-counter Ibuprofen tablets.

For this reason alone, the strip search of Savana violated the dictates of *T.L.O.* and the Fourth Amendment. U.S. Br. at 21-22.

Considering the third factor, there is nothing approaching a heightened weight of evidence to support the suspicion here. Indeed, there is even less basis to conduct a strip search here than in *Phaneuf*, *Fewless*, and numerous other cases. Here, the evidence offered to justify the strip search is: 1) a student, Jordan, who had admitted inappropriate drug use to school officials only a week earlier, gave assistant principal Kerry Wilson a 400 mg Ibuprofen tablet that he said another student, *Marissa*, had given to him and told Wilson that a group of students were planning to take pills at lunch; 2) Wilson had *Marissa* empty her pockets and wallet, finding several more pills; 3) when asked where the blue pill came from, *Marissa said* that Savana gave her the pills. *See* Pet. App. 3a-9a. Savana denied having possessed or distributed any pills at school and the search of her backpack revealed no contraband. J.A. 22a-23a, ¶¶ 11-16.

Similar to *Phaneuf* and *Fewless*, the only actual "evidence" of drug possession *by Savana* is the statement of a single student who was already in trouble for possessing medication. There is no evidence that this student, with an obvious motive to get herself out of trouble by blaming someone else, should be deemed credible.

First, there is no indication in the record that Wilson questioned Marissa about the veracity of her accusation or the depth and status of her alleged

friendship with Savana. Second, at no point in Wilson's affidavits does he state that he found Marissa credible, whether because of her alleged friendship with Savana or for any other reason. Third, as in *Fewless*, Wilson did not question other students or teachers regarding Marissa's accusation and did not search Savana's locker, nor did any adult report any suspicious behavior by Savana. And, as in *Fewless,* there was a powerful ulterior motive of the student tipster that went ignored: when caught with forbidden medication in the assistant principal's office, it would not be surprising if a middle school student accused someone else rather than accept guilt.

Nor can the planner noted in the panel discussion provide any support for the strip search. First, the planner was found near Marissa's desk, not with Savana. Only through a twisted fallacy does *Marissa's* possession of a planner containing *Marissa's* contraband (not including the medication) become evidence of Savana's possession of medication so as to justify a strip search. Not only is this a prohibited "vault" from one type of contraband to another, *see Phaneuf*, 448 F.3d at 600, but also it is a transfer of suspicion from *Marissa*, who actually possessed the contraband, to Savana, who was only "guilty" of lending Marissa a planner.

Additionally, although Petitioners have attempted to make much hay of "unusually rowdy behavior" and a student tip/rumor of Savana serving alcohol prior to a school dance months earlier, these allegations do not legitimately support any reasonable suspicion of Savana distributing

medication at school or hiding it in her clothes. First, if teenagers being "rowdy" offered justification to strip search them, the Fourth Amendment would have to exclude teenagers from protection altogether. Second, the rumor of serving alcohol was flatly denied by April Redding, Savana's mother, and never corroborated. *See* J.A. 11a, ¶¶ 5-6. Finally, even if the rumor were true, serving alcohol prior to a school dance months earlier provides no more evidence of possessing Ibuprofen at school than possession of cigarettes provides evidence of marijuana possession. *See Phaneuf*, 448 F.3d at 600. The former simply provides no support for reasonable suspicion of the latter.

Considering the fourth factor, school officials ignored alternatives to a strip search to neutralize any potential immediate danger. The purported exigency in this situation was the statement from Jordan to Wilson that "a group of students was planning on taking the [Ibuprofen] pills at lunch." J.A. 11a, ¶ 7. Again, there is simply no corroboration for this statement made by a single student. Nor is there any indication that school officials attempted to identify who was in this group, or that they took any steps to stop them. Rather than resorting to a strip search, school officials could have monitored the situation at lunch and then questioned any students seen to be forming such a group. As to Savana specifically, school officials could have called her parents and sent her home for the day. They also could have questioned her teachers as to whether she exhibited suspicious behavior and possibly searched any locker or desk drawer she may have had.

In short, rather than conducting a strip search under the circumstances here, the constitutional course of action under *T.L.O.* is to investigate and potentially conduct a limited, less intrusive search of personal items and pockets. *See, e.g.*, *Bravo ex rel. Ramirez v. Hsu*, 404 F. Supp. 2d 1195, 1201-02 (C.D. Cal. 2005) (following tip from student and bathroom monitor regarding drug possession by eighth grade girl, assistant principal searched her backpack, pockets, and shoes, but "[t]he search was not excessively intrusive in light of [the girl's] age and sex: [the girl] was not asked to disrobe or physically touched."); *see also Sostarecz v. Misko*, No. Civ. A. 97-cv-2112, 1999 WL 239401, at *6 (E.D. Pa. Mar. 26, 1999) (finding that where nurse tests of vital signs and pupils of student suspected of drug use were normal, no "reasonable person would then force the student" to submit to a strip search). Of course, it would be easier if school officials could simply search every student accused by anyone of possessing contraband regardless of circumstance, just as it would be easier for police to strip search anyone they might think has contraband. But such methods, while administratively easier, do not comport with the Fourth Amendment. Moreover, school officials, unlike law enforcement, must balance the likelihood that they will harm those entrusted to their care against the desire to take every possible precaution for safety and order at school.

Accordingly, the question for the Court is whether a mere suspicion that an honors student with no disciplinary problems might have Ibuprofen (even

though none was found in her backpack), based on an uncorroborated tip without locational specificity from another student already in trouble for possessing the same medication, justifies a strip search that exposed a thirteen year-old girl, subjecting her to immediate humiliation and embarrassment, and to emotional and social trauma. If children retain any right to privacy at the schoolhouse, as this Court has repeatedly stated they do,[4] the answer must be a resounding no. Under *T.L.O.*, this Court should find that the strip search of Savana Redding was unreasonable and in violation of the Fourth Amendment.

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[4] *See Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 2622 (2007) ("[S]tudents do not 'shed their constitutional rights … at the schoolhouse gate.'") (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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